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IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. 34

SEARS, ROEBUCK & CO.,
Petitioner,

vs.

BRUCE A. MACKEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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The Scheffer Press, Inc.—ANdover 3-6850

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Opinions Below.

The opinions of the District Court (R. 22-25; 35-36), and the opinion of the Court of Appeals denying petitioner's motion to dismiss the appeal (Pet. App. A, 2a-9a), are not reported. No opinion has been rendered by the Court of Appeals on the merits of respondent's appeal.

Jurisdiction.

No judgment or decree has been entered by the Court of Appeals. Petitioner invokes this Court's power to review cases in the courts of appeals "before or after judgment or decree". 28 U.S.C. §1254(1).

Rule Involved.

Rule 20 of the Revised Rules of the Supreme Court of the United States reads as follows:

"Certiorari To A Court Of Appeals Before Judgment.

"A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110; *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579."

Questions Presented.

1. Whether petitioner has made the showing of imperative public importance required by Rule 20 of the Rules of this Court.

2. Whether an order dismissing a claim for relief under the antitrust laws based on events "A", "B" and "C" in combination, and also a claim for relief under the common law based on event "A", is appealable notwithstanding the fact that claims for relief based respectively on events "B" and "C" were not dismissed.

Statement.

The complaint filed by respondent (hereinafter sometimes referred to as "plaintiff"), originally contained six

counts, but only four counts are now material.[1] (R. 3) In Count I plaintiff alleges a continuing violation of the antitrust laws by petitioner (hereinafter sometimes referred to as "Sears"), consisting of a predatory program of destruction aimed at all of plaintiff's business activities. Counts II, III and IV are common law counts, each involving a separate event and a separate business. Count II alleges that Sears intentionally destroyed plaintiff's lamp business (Metalcraft) by means of localized price-cutting; Count III alleges that Sears induced a breach of plaintiff's commission arrangement with a tool supplier (Vascoloy) by means of a threatened secondary boycott; Count IV alleges unfair competition with plaintiff's tool business (Time Saver).

The District Court ordered Counts I and II stricken without leave to amend, found that there was no just reason for delaying the final determination of the issues raised by these counts, and expressly directed that judgment be entered against plaintiff on said counts. (R. 36-38). Thus, final judgment was entered on the claim for relief under the antitrust laws, based on all of the events in combination, and also on the claim for relief under the common law based on the intentional destruction of plaintiff's lamp business. The portions of the complaint which remain, and are now pending for trial, are not based on the antitrust laws and contain no allegations pertaining to plaintiff's lamp business.

Petitioner submitted to the District Court a draft order and judgment containing the findings required by Rule

[1] Count V, which was based on Section 2(f) of the Robinson-Patman Act was abandoned after the decision of this Court in **Automatic Canteen Co. v. Federal Trade Commission**, 346 U.S. 61 (R. 22). All of the allegations of Count VI were stricken, except insofar as that count realleged the allegations contained in Count III. (R. 37).

ARGUMENT.

1. Petitioner has not complied with Rule 20 of the Rules of this Court.

The application for certiorari is made before judgment in the Court of Appeals. Accordingly, under Rule 20 of the Rules of this Court, petitioner must make a showing that this case is of such imperative public importance as to require immediate settlement by this Court.[1] Petitioner has not even attempted to comply with this Rule. And, in fact, the necessary showing could not conceivably be made.

In urging the Court to depart from its normal procedure, petitioner cites no cases in which certiorari was granted before the termination of proceedings in the Court of Appeals.[2] Petitioner merely argues that if the Court does not grant certiorari at this time, it will never have an opportunity to pass on the question sought to be presented. This is not so, as is demonstrated by the many cases in which this Court has decided comparable jurisdictional issues after the termination of proceedings in the Court of Appeals. See *e.g., Reeves* v. *Beardall*, 316 U.S. 283 (1942). The question raised by this petition can be presented to this Court in this very case after the Court of Appeals has determined the merits of the appeal

[1] The showing required is one which might well lead the Court to convene a Special Term if necessary. The Court did so in **Ex parte Quirin**, 317 U.S. 1, and, if it had not been sitting, probably would have done so in the most recent cases cited in Rule 20. **United States v. United Mine Workers**, 330 U.S. 258; **Youngstown Co. v. Sawyer**, 343 U.S. 579.

[2] In all of the cases cited by petitioner (Pet. 9), judgment had been given by the Court of Appeals. The orders involved were interlocutory only in the sense that further proceedings in the trial court were contemplated.

pending before it. If the District Court's order is affirmed, plaintiff can apply for certiorari; if it is reversed, Sears can do so.[1] Upon such an application even if the jurisdictional question is not raised by the litigants, this Court will consider it of its own motion.

Even if the Rule 54(b) question would not otherwise come before this Court in this case, this is not a reason for granting certiorari at this time. Surely, if the question is as important as petitioner claims, it will reach the Court in other cases. In any event, it is not of "imperative public importance" to have Rule 54(b) construed in this case instead of another.

2. The Question of the Effect of the 1948 Amendment to Rule 54(b) is not Presented by the Record.

The District Court's order would have been appealable prior to the amendment to Rule 54(b), and it is uniformly held that orders which would have been appealable prior to the 1948 amendment are now appealable if the requisite findings are made. The order and judgment of the District Court is such an order.

All allegations with respect to plaintiff's lamp business were stricken, as were all antitrust allegations. Only Count III which alleges inducing breach of contract and Count IV which alleges unfair competition with plaintiff's tool business, were left for trial. Accordingly, the order dismissing Counts I and II would have been appealable prior to the 1948 amendment. *Reeves* v. *Beardall*, 316 U.S. 283 (1942); *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83 (C.A. 2d 1939). Since the finding required by amended Rule 54(b) was made, the order is appealable

[1] The fact that Sears as a matter of tactics may not choose to apply for certiorari at that time (Pet. 10) is certainly not a reason for this Court to grant certiorari now.

whatever construction is given to the 1948 amendment to the Rule.

This Court's consideration of the effect of the 1948 amendment to Rule 54(b) should await an appeal from the dismissal of an order which would not have been appealable prior to the amendment.

3. The Decision of the Court of Appeals is Clearly Correct.

For the reasons stated by the Court of Appeals, it is clear that its interpretation of the 1948 amendment to Rule 54(b) properly reflects the intention of its draftsmen. There can be no more question of this Court's power to promulgate the amendment, than there was about the validity of original Rule 54(b) which was upheld in *Reeves* v. *Beardall*, 316 U.S. 283 (1942).

CONCLUSION.

The orderly progress of this litigation should not be delayed by the issuance of a writ of certiorari at this stage of the proceedings. Since the time in which Sears may file its brief on the merits in the Court of Appeals has been extended until after this Court acts on the petition for certiorari, respondent prays that the petition be promptly denied.

Respectfully submitted,

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54(b), as amended in 1948. That order was entered, and respondent appealed. After the record had been printed and filed, and after respondent had filed his printed brief, petitioner moved to dismiss the appeal on the ground that the order of the District Court lacked finality. The Court of Appeals denied the motion, and now petitioner seeks certiorari in advance of any ruling by the Court of Appeals on the merits of respondent's appeal.